

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2006B058

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

NORMA JEAN MAGGARD,

Complainant,

vs.

**COLORADO DEPARTMENT OF HUMAN SERVICES, COLORADO STATE VETERANS
HOME AT FITZSIMONS,**

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on July 10, 2006 and September 6, 2006, at the State Personnel Board, 633- 17th Street, Courtroom 6, Denver, Colorado. Assistant Attorney General Joseph F. Haughain represented Respondent. Respondent's advisory witness was Gary Kotz, the appointing authority. Complainant appeared and was represented at hearing by Robert Thompson, Esq.

MATTER APPEALED

Complainant, Norma Jean Maggard ("Complainant") appeals her termination by Respondent, Colorado Department of Human Services, Colorado State Veterans Home At Fitzsimmons ("Respondent" or " facility"). Complainant seeks reinstatement, backpay, and an award of attorney fees and costs with interest.

For the reasons set forth below, Respondent's action is **affirmed with modifications.**

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;

4. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. Complainant worked as a Certified Nursing Assistant for Respondent for approximately three years before her employment was terminated. Complainant was a certified state employee at the time her employment ended.

Events of November 28 and 29, 2005:

2. On November 28, 2005, Complainant left work at the facility early because of a toothache.

3. On November 29, 2005, Complainant was scheduled to work her normal shift. Before her shift began, she called in and explained that she had a bad toothache and could not work. The facility scheduler, Kellie Smith Kauffman, then found a replacement for Complainant's shift.

4. Shortly before her shift began, Complainant called into work and said she was feeling better and would be coming in that day. Complainant started her shift at the normal time.

5. After approximately two hours, Complainant felt too ill to continue working. By this time, Complainant's replacement had left. Ms. Kauffman instructed Complainant to ask another worker to cover for her. After Complainant had arranged for her replacement, she left work and had a tooth extracted.

6. Complainant asked for her time off to be paid, so she was charged 6.5 hours of holiday bank time to cover all of her hours on that date.

7. Complainant did not submit a note from a doctor for her absence on either November 28 or 29, 2005.

Events of November 30, 2005:

8. By letters dated August 24, 2005, Respondent issued both a disciplinary action and a corrective action to Complainant for comments made by Complainant in front of patients and for yelling and shaking her finger in the face of the Assistant Director of Nursing while arguing with her. The corrective action component required Complainant to undergo weekly meetings for a 90 day period to review Complainant's performance and to attend an anger management class at the Colorado State Employee Assistance Program ("CSEAP").

9. The CSEAP class is formally titled as an Anger Education Class. It meets in Denver

on one morning each week for four weeks. In the August 24, 2005 Corrective Action, Complaint was directed that the class schedule was October 14, 21, 28, and November 4, 2005. Complainant was not given a set deadline for completion of the course.

10. The information provided to Complaint about the class schedule was not entirely consistent with the CSEAP program. As was later clarified by CSEAP, one class with four sessions was held for four weeks in October, 2005. Another class on the same topic taught by a different instructor was also held over four weeks in November, 2005. The CSEAP program is designed so that an employee in the class generally attends all four sessions of that class, rather than mix sessions from various classes.

11. Respondent's Director of Nursing instructed Ms. Kauffman to schedule Complainant to work in the mornings of the class. Complainant was then permitted to leave around 8:00 AM to attend the class, and then allowed to return to work after the class.

12. Complainant attended one of the Anger Education Class sessions in October, and two of the sessions in November. On the days of these three sessions, Complainant was scheduled to work in the morning and then return to work after the class.

13. Respondent was aware that Complainant was scheduled to attend her final Anger Education Class on November 30, 2005.

14. Ms. Kauffman was told to take Complainant off the schedule entirely for the November 30 class date.

15. When Complainant arrived at work on November 30, she realized that she had not been scheduled for any hours that day. She went to Ms. Kauffman's office to find out why she had not been scheduled for work that day.

16. At the time Complainant was in Ms. Kauffman's office, the Assistant Director of Nursing ("ADON"), Portia Benjamin, was sitting in the office going over the daily staffing report.

17. Ms. Kaufman told Complainant that she hadn't scheduled her for work because it was to be her last day in the anger management class. Ms. Kauffman asked Complainant whether she was going to the class, and Complainant told her that she didn't have the gas money to attend the class. Complainant also acknowledged that she had not discussed her decision to not attend the class with anyone.

18. Complainant's tone of voice was angry, rude, and loud as she spoke about her decision not to attend the class.

19. Ms. Kauffman and Complainant examined the facility work schedule and found a position that Complaint could cover for the day. Complainant worked that day and did not attend the anger management class.

20. Prior to December 7, 2005, Complainant had registered for the February 2006 Anger Education Class.

Events of December 1, 2006:

21. Ms. Kauffman reported Complainant's actions on both November 29 and 30 to Sabrina Hicks. Ms. Hicks serves as the facility's assistant director on human resources and staff issues. On December 1, 2006, Complainant was instructed to go speak with Ms. Hicks.

22. When Complainant arrived at Ms. Hicks' office, she was told that the facility was placing her on administrative leave pending an investigation. Ms. Hicks asked Complainant for her badge and keys. Complainant became upset, loud, and angry and she began crying. She told Ms. Hicks that she was "sick of this shit."

23. Ms. Hicks escorted Complainant outside the facility at the end of their discussion.

24. While in the parking lot, Complainant saw Ms. Kauffman getting into her vehicle and preparing to leave. Complainant spoke to Ms. Kauffman at that point. Ms. Kauffman later reported that Complainant was angry during this interaction, used profanity, and told Ms. Kauffman that Ms. Kauffman had better watch her back.

R-6-10 Meeting and Disciplinary Action

25. On December 13, 2005, Complainant's appointing authority, Gary Kotz, held a 6-10 meeting with Complainant. Ms. Hicks also attended the meeting. Complainant was represented by Teresa Zoltanski at the meeting.

26. The purpose of the 6-10 meeting was to discuss Ms. Kaufman's allegations concerning Complainant's interaction with her on November 30 and in the parking lot on December 1, Complainant's comments to supervisors at the time she was being placed on administrative leave on December 1, and Complainant's compliance with the August 24, 2005 corrective action.

27. By letter dated January 3, 2006, Mr. Kotz issued his decision that discipline was warranted and that he was terminating Complainant's employment as of January 3, 2006.

28. In support of his decision, Mr. Kotz found that Complainant's actions constituted a "failure to perform competently, willful misconduct and a willful failure to perform."

29. Mr. Kotz concluded that, on November 28, 2005, Sabrina Hicks had told Ms. Zoltanski that Complainant was to obtain a doctor's note for her absence, that Ms. Zoltanski had confirmed that she had delivered the message, and that Complainant had failed to produce such a note.

30. Mr. Kotz found that Ms. Kaufman's version of events in her office on November 30 was credible, and represented Complainant's "inappropriate interactions with co-workers."

31. Mr. Kotz declined to take action based upon the allegations of Complainant's interaction with Ms. Kauffman in the parking lot on December 1, 2005, because he had interviewed a witness to the interaction who had stated that Complainant did not appear to be angry or intimidating during the conversation.

32. In reaching his decision to terminate Complainant, Mr. Kotz also considered that Complainant had a prior memo in her file about angry outbursts. He considered that Complainant had received a low rating of "1" in her April 2005 performance review for her ability to resolve conflicts and that her peer reviews in that evaluation period had noted a difficulty in dealing with peers in a constructive manner. Mr. Kotz additionally considered that the facility had made prior attempts to assist Complainant in avoiding angry outbursts by having her attend a conflict resolution class and an anger management class.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) false statements of fact during the application process for a state position;
- (4) willful failure or inability to perform duties assigned; and
- (5) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, 886 P.2d at . The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

A. Complainant did not commit all of the acts for which she was disciplined.

Respondent's case for terminating Complainant's employment was built upon a

series of events taking place during three days at the end of November and early December 2005. Not all of the allegations about those events, however, were supported by credible and persuasive evidence at hearing.

On the issue of failing to provide a doctor's note, it was undisputed at hearing that Complainant never provided such a note to Respondent. Respondent, however, failed to persuasively establish that providing a doctor's note for Complainant's partial day absence due to sickness was necessary.

Respondent's witnesses were not in agreement as to why a doctor's note would have been expected under these circumstances, with some witnesses stating that it was necessary in every sick leave case and another witness explaining that Complainant would be required to submit a note because of a prior corrective action concerning her attendance. Complainant's defense included persuasive testimony which cast serious doubt on Ms. Hick's assertion that, as of November 28, 2005, she had informed Complainant (by way of a conversation with Ms. Zoltanski) of the need for Complainant to submit a doctor's note and that Ms. Zoltanski had confirmed that she had delivered that message. Additionally, it appears that the facility had a policy of using of holiday time if no doctor's note was produced to justify the use of sick time, and that this policy was followed in this case for Complainant's sick leave on November 29. The existence of this policy indicates that a doctor's note is necessary if an employee wishes to tap his or her sick leave bank, but that there are other options not requiring a doctor's note available if sick leave time is not to be utilized. The policy also undercuts the credibility of the witnesses who testified that doctor's notes were to be produced in every case as matter of standard policy. In the end, Respondent failed to establish credible and persuasive evidence that Complainant was properly informed that she needed to produce a doctor's note for her absences related to her tooth problem.

Respondent also failed to produce persuasive evidence that the interaction between Complainant and Ms. Kauffman on November 30, 2005, was as serious as originally alleged by Ms. Kauffman. Ms. Kauffman testified that the interaction was threatening to her, that Complainant was directly in her face and within approximately eighteen inches of her, and that Complainant made very specific and often profane comments during the interaction. There was an eyewitness to this event in the room during the entire interaction, ADON Benjamin. At hearing, however, Ms. Benjamin did nothing more than adopt her e-mail description of the event. The e-mail confirms that Complainant stated loudly and angrily that she did not have the money for gas to drive all the way out to the class, that Complainant confirmed that she had not told anyone that she had decided not to attend the class, and that Complainant was rude and loud during this interaction. Those details, however, represent the entire extent of the corroboration provided by Ms. Benjamin. Even after Complainant testified to a very different set of events in Ms. Kauffman's office on November 30, Respondent did not have Ms. Benjamin confirm the details of Ms. Kauffman's version of the interaction. Respondent has not proven by a preponderance of the evidence that the incident on November 30 in Ms. Kauffman's office was as serious as originally alleged.

Respondent also did not present testimony from Sandra Malafronte, another of Complainant's supervisors with whom she interacted on December 1, 2005. As a result, there was insufficient competent evidence presented at hearing to establish what, if anything, Complainant said to Ms. Malafronte on December 1, 2005.

There was persuasive and competent evidence that Complainant had failed to complete the fourth class of the anger management course that she was required to take pursuant to her August 24, 2005 corrective action, and that she had failed to talk with anyone about not attending the full class.

Respondent also produced a preponderance of the evidence to support that Complainant was rude and loud when she spoke with Ms. Kauffman on November 30, 2006, in discussing the anger management class.

Finally, there was a preponderance of evidence that Complainant was loud and angry when she told Ms. Hicks on December 1, 2005, that she was "sick of this shit."

B. The Appointing Authority's action in taking discipline was not arbitrary, capricious, or contrary to rule or law.

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

In determining whether the appointing authority acted in a manner arbitrary, capricious or contrary to rule or law, the Board's analysis is generally split into two separate considerations: first, whether the decision to discipline is arbitrary, capricious or contrary to rule or law and, second, assuming that discipline in some form is warranted, whether the level of discipline imposed is within the reasonable range of alternatives.

The first issue is whether Respondent has acted in manner which is arbitrary, capricious, or contrary to rule or law in deciding that Complainant's loud and angry interaction on November 30, her statement to Ms. Hicks on December 1, and her failure to complete her anger management class by December 1, 2005 constituted proper grounds discipline.

Professional interactions are part of any employee's obligation. There was no persuasive argument made at hearing that Respondent acted in an arbitrary or capricious

manner in deciding that Complainant had not acted professionally in her interactions with Ms. Kauffman on November 30 or with Ms. Hicks on December 1. Respondent's decision to base discipline on Complainant's statements made on November 30 and December 1 was also not contrary to any rule or law.

Complainant also had an obligation to complete the anger management class ordered by her August 24, 2005 corrective action, unless and until that requirement was modified by Respondent. It was clear from the evidence that Complainant had been permitted by facility management to finish her class on November 30, 2005, but her unilateral decision on that date to skip the class meant that she had failed to complete the requirements of her corrective action. Complainant's failure to complete the class by December 1, 2005, therefore, also provides a valid basis for the imposition of discipline. Respondent's decision to impose discipline for this failure is not arbitrary, capricious, or contrary to rule or law.

C. The discipline imposed was not within the range of reasonable alternatives

The credible evidence demonstrates that the appointing authority made the decision to terminate Complainant's employment while under the impression that Complainant had failed to produce a doctor's note for her November 28, 2005 absence after being properly instructed to produce such a note. He also believed the more inflammatory version of events presented by Ms. Kauffman and did not limit his consideration to the facts that were corroborated by ADON Benjamin.

The fact that Mr. Kotz considered unproven assertions in his determination of discipline does not, in itself, invalidate his decision on the level of discipline to be imposed. The discipline chosen, however, must still be within the range of reasonable alternatives when only the proven allegations are considered.

There were also mitigating circumstances present in this matter which did not appear to have been considered by Mr. Kotz.

When Complainant arrived at work on November 30, she found that the original plan which allowed her to work both before and after her class had been disregarded, and that she had been taken entirely off of the schedule. It was not clear from the testimony at hearing why that decision was made or who had made it, but it was an unpleasant, change in expectations and it is not surprising that Complainant would react to the revised plan.

It is also true that Complainant told her supervisor that she was tired of "this shit." That comment, however, was made as she was being asked for her badge and keys and being escorted out of the building. It is not as surprising, or as much of a violation of professional expectations, for the comment to be made under such circumstances rather than in the normal course of work.

Finally, Complainant's failure to complete the anger management course was not an

entire disavowal of her responsibility to take the class. Complainant had taken three of the four classes, and she had signed up for the sessions available in February to complete her obligation. The corrective action did not specify a time by which the course had to be completed, and it appears from the events that the facility management was aware and at least tacitly approved of Complainant finishing the course outside of the original class schedule listed in the corrective action.

These circumstances do not completely excuse Complainant's conduct in this case. These circumstances, however, make Complainant's reactions more explicable and less of a deviation from professional norms and expectations.

This is an employee who has had a problem with loud and intemperate comments while at work. It also appears, however, that she was learning how to tone down her comments. The actions that she took in this case were not of the magnitude described in her prior memos and disciplinary action.

In the end, given that the more serious versions of events were not proven at hearing and that, of the proven allegations, mitigating circumstances were present for each one, Mr. Kotz's decision to terminate Complainant's employment was not within the range of reasonable alternatives. Mr. Kotz did not pursue his decision sufficiently thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances, as he was required to do under Board Rule 6-9, 4 CCR 801.

Given the history of the issue with Complainant, significant discipline is within the range of reasonable alternatives. A 30 day suspension without pay is, however, the maximum that a reasonable range of alternatives should include. A 30 day suspension is an appropriate response to Complainant's conduct in this matter.

D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule 8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38(B), 4 CCR 801.

The choice of termination, rather than some lesser form of discipline, may be so strained that it creates a separate basis for a finding of a groundless personnel action. See *Coffey v. Colorado School of Mines*, 870 P.2d 608, 610 (Colo. App. 1993) (holding that the fact that some discipline could be imposed in the matter did not insulate the agency from having pursued a groundless termination action because the attorney fees analysis focuses upon the specific personnel action taken). Under the Board rules, a groundless action is defined as "an action or defense in which it is found that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense." Board Rule 8-38(A)(3).

In this case, Complainant had failed to complete her anger management course in a reasonable time period, she used language which was loud and rude while speaking to Ms. Kauffman, and she used profanity when discussing her administrative suspension with Ms. Hicks. Complainant also has a disciplinary history of acts in which she has used poor judgment in her choice of expression. As previously discussed, Complainant's actions have mitigating circumstances associated with them and do not reasonably support the sanction of termination. These facts, however, provide Respondent with at least some competent evidence to support a decision to terminate Complainant's employment.

Under such circumstances, the choice to terminate Complainant's employment does not fall into the category of a groundless personnel action. There was also no persuasive evidence presented that the personnel action was taken frivolously, maliciously, as a means of harassment, or in bad faith. An award of attorney fees is not warranted.

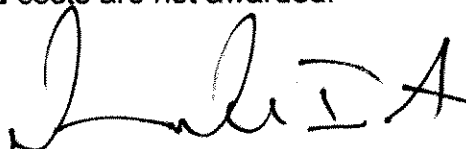
CONCLUSIONS OF LAW

1. Complainant committed only some of the acts for which she was disciplined.
2. Respondent's action in disciplining Complainant was not arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was not within the range of reasonable alternatives.
4. Attorney's fees are not warranted.

ORDER

Respondent's action is **affirmed with modifications**. Complainant is reinstated with full back pay and benefits, except that the amount of backpay is to be calculated as if Complainant had served a 30 day suspension without pay. Respondent has the option of ordering Complainant to attend either the full CSEAP Anger Education course or to attend the final day of that course. Attorney fees and costs are not awarded.

Dated this 23rd day of October, 2006.



Denise DeForest
Administrative Law Judge
633 - 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is \$50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An appellant may file a reply brief within five days. Board Rule 8-72, 4 CCR 801. An original and 9 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65, 4 CCR 801.

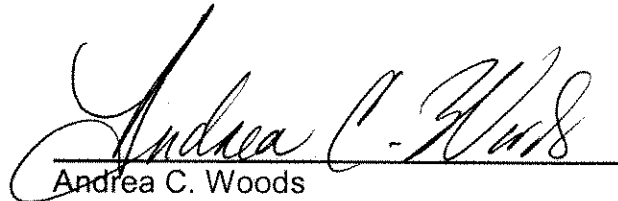
CERTIFICATE OF SERVICE

This is to certify that on the **24th** day of **October 2006**, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE** and **NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Robert W. Thompson, Esq.
Attorney at Law
366 South Victor Street
Aurora, Colorado 80012

and in the interagency mail, to:

Joseph Haughain
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203


Andrea C. Woods